

XAVIER BECERRA  
Attorney General of California  
KATHLEEN BOERGERS, State Bar No. 213530  
NELI N. PALMA, State Bar No. 203374  
KARLI EISENBERG, State Bar No. 281923  
STEPHANIE T. YU, State Bar No. 294405  
1300 I Street, Suite 125, P.O. Box 944255  
Sacramento, CA 94244-2550  
Tel: (916) 210-7522; Fax: (916) 322-8288  
E-mail: Neli.Palma@doj.ca.gov  
*Attorneys for Plaintiff State of California, by  
and through Attorney General Xavier Becerra*  
JAMES R. WILLIAMS, State Bar No. 271253  
County Counsel  
GRETA S. HANSEN, State Bar No. 251471  
LAURA S. TRICE, State Bar No. 284837  
MARY E. HANNA-WEIR, State Bar No. 320011  
SUSAN P. GREENBERG, State Bar No. 318055  
H. LUKE EDWARDS, State Bar No. 313756  
Office of the County Counsel, Cty. of Santa Clara  
70 West Hedding Street, East Wing, 9th Fl.  
San José, CA 95110-1770  
Tel: (408) 299-5900; Fax: (408) 292-7240  
Email: mary.hanna-weir@cco.sccgov.org  
*Attorneys for Plaintiff County of Santa Clara*

DENNIS J. HERRERA, State Bar No. 139669  
City Attorney  
JESSE C. SMITH, State Bar No. 122517  
Chief Assistant City Attorney  
RONALD P. FLYNN, State Bar No. 184186  
Chief Deputy City Attorney  
YVONNE R. MERÉ, State Bar No. 173594  
SARA J. EISENBERG, State Bar No. 269303  
JAIME M. HULING DELAYE, State Bar No. 270784  
Deputy City Attorneys  
City Hall, Rm 234, 1 Dr. Carlton B. Goodlett Pl.  
San Francisco, CA 94102-4602  
Tel: (415) 554-4633, Fax: (415) 554-4715  
E-Mail: Sara.Eisenberg@sfcityatty.org  
*Attorneys for Plaintiff City and County of San  
Francisco*  
LEE H. RUBIN, State Bar No. 141331  
Mayer Brown LLP  
3000 El Camino Real, Suite 300,  
Palo Alto, CA 94306-2112  
Tel: (650) 331-2000, Fax: (650) 331-2060  
Email: lrubin@mayerbrown.com  
*Attorneys for Plaintiffs County of Santa Clara, et  
al.*  
*\*Additional Counsel Listed on Signature Pages*

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO,  
Plaintiff,  
vs.  
ALEX M. AZAR II, et al.,  
Defendants.

STATE OF CALIFORNIA, by and through  
ATTORNEY GENERAL XAVIER BECERRA,  
Plaintiff,  
vs.  
ALEX M. AZAR, et al.,  
Defendants.

COUNTY OF SANTA CLARA, et al.  
Plaintiffs,  
vs.  
U.S. DEPARTMENT OF HEALTH AND  
HUMAN SERVICES, et al.,  
Defendants.

No. C 19-02405 WHA  
No. C 19-02769 WHA  
No. C 19-02916 WHA

**PLAINTIFFS' RESPONSE TO ORDER  
RE USE OF TERM "ENTITY"**

Date: October 30, 2019  
Time: 8:00 AM  
Courtroom: 12  
Judge: Hon. William H. Alsup  
Action Filed: 5/2/2019

**I. THE 2019 RULE’S DEFINITION OF “ENTITY” INCLUDES “HEALTH CARE ENTITIES”**

The answer to the question posed in the Court’s November 8, 2019 Order is yes. Church does not use the term “health care entity,” only “entity.” The Rule, however, defines the term “entity” to include essentially anyone, including all health care entities. It defines “entity” as:

a ‘person’ as defined in 1 U.S.C. 1; the Department; a State, political subdivision of any State, instrumentality of any State or political subdivision thereof; any public agency, public institution, public organization, or other public entity in any State or political subdivision of any State; or, as applicable, a foreign government, foreign nongovernmental organization, or intergovernmental organization . . . .

84 Fed. Reg. 23,263 (Section 88.2). In turn, Section 1 of the U.S. Code defines “person” to “include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.” In other words, HHS’s “entity” definition includes—without limitation—any corporation, company, individual, government, or public agency.<sup>1</sup> The subset of corporations, companies, individuals, and public entities that also qualify as “health care entities” under the Rule *necessarily* fall within this capacious definition of “entity.”

The regulatory history of the terms “entity” and “health care entity” supports this conclusion. The 2019 Rule seeks to “generally reinstate” HHS’s 2008 rule.<sup>2</sup> 84 Fed. Reg. 23,179. In that earlier rule, HHS subsumed the term “entity” as used in Church under the definition of “health care entity” as used in Weldon and Coats-Snowe. *See* 73 Fed. Reg. 78,072, 78,076 (Dec. 19, 2008) (“[T]he Department thought it would be beneficial to provide a clear and consistent definition that it would apply when implementing any of the three statutes.”); *id.* at 78,091 (Church “does not define the term ‘entity,’ and does not use the term ‘health care entity.’ In keeping with the definitions in PHS Act § 245 and the Weldon Amendment, the Department proposed to define ‘health care entity’ to include the specifically mentioned types of individuals

<sup>1</sup> HHS has argued that although there is no limiting principle within the definition of “entity” itself, “[f]or some statutes . . . , the Applicability paragraph [of the Rule] by its own terms may only implicate certain types of entities or only entities receiving certain types of funding.” 84 Fed. Reg. 23,170. While the Applicability paragraph concerning the Church Amendment indicates that it applies only to entities that receive certain funding, nothing in that paragraph limits the types of entities covered. *Id.* at 23,264-65 (Section 88.3(a)(1)).

<sup>2</sup> The 2008 rule never meaningfully went into effect. *See New York v. U.S. Dep’t of Health & Human Servs.*, 2019 WL 5781789, at \*8–\*9 (S.D.N.Y. Nov. 6, 2019). It became effective on January 20, 2009 without the certification requirements and was rescinded by the 2011 rule on February 23, 2011. During that period, it appears it was not enforced. *Id.* at \*8.

1 and organizations from the two statutes, as well as other types of entities referenced in the Church  
 2 Amendments.”). While the 2008 rule used identical definitions for the terms “entity” and “health  
 3 care entity,” *id.* at 78,097, the 2019 Rule is even broader, going beyond the definitions covered by  
 4 the 2008 Rule. 84 Fed. Reg. 23,179, 23,263.<sup>3</sup>

5 Defendants may argue that the 2019 Rule attempts to limit “health care entity”—contending  
 6 that it applies only to instances specific to Weldon, Coats-Snowe, and ACA Section 1553. But the  
 7 2019 Rule makes clear that “health care entity” applies broadly to *any* circumstance in which a  
 8 conscience objection may be made. *Id.* at 23,184 (“If the Department becomes aware that a State  
 9 or local government or a health care entity may have undertaken activities that may violate *any*  
 10 statutory conscience protection...” (emphasis added); 23,194–96 (“health care entity”  
 11 encompasses a non-exclusive list that may vary case-by-case).<sup>4</sup> This renders unavailing any  
 12 argument by HHS that the 2019 Rule applies the term “health care entity” only to statutes that  
 13 include that term—namely, Weldon, Coats-Snowe, and ACA Section 1553.

## 14 **II. HHS’S DEFINITION OF “ENTITY” CONFLICTS WITH CHURCH**

15 HHS’s definition of the term “entity” conflicts with Church. As an initial matter, the  
 16 language, context, and legislative history of Church establish that it was intended to apply to  
 17 those with a close nexus to the procedure, like doctors and nurses, as well as religious hospitals.  
 18 By defining entity broadly enough to sweep in countless others, HHS has contravened Congress’s  
 19 will. Moreover, both Coats-Snowe and Weldon define “health care entity” to include both  
 20 individuals and certain institutions. *See* 42 U.S.C. § 238n(c)(2); 132 Stat. 2981, 3118. But Church  
 21 carefully distinguishes between an “entity” and an “individual,” with some provisions applying to  
 22 entities, some applying to individuals, and some applying to both. *See, e.g.,* 42 U.S.C. § 300a-  
 23 7(b) (“The receipt of any grant, contract, loan, or loan guarantee under [the covered Acts] by any

24 <sup>3</sup> In 2011, HHS rescinded the 2008 definitions, stating that the 2008 Rule had “caused confusion  
 25 regarding the scope of the federal health care provider conscience protection statutes” and might  
 26 “negatively affect the ability of patients to access care if interpreted broadly.” 76 Fed. Reg. at  
 27 9973–74; *see also New York*, 2019 WL 5781789, at \*9. HHS’s failure even to acknowledge that  
 28 the 2011 rule rescinded the previous definition for fear of creating confusion is arbitrary and  
 capricious. *New York*, 2019 WL 5781789, at \*46.

<sup>4</sup> *See also* <https://www.hhs.gov/sites/default/files/final-conscience-rule-factsheet.pdf> (combining  
 conscience protections of various provisions as protecting “health care entities and employees”).

1 *individual or entity* does not authorize any court or any public official or other public authority to  
 2 require -- (1) such *individual* to [take certain actions], or (2) such *entity* to [take certain actions]”);  
 3 *id.* § 300a-7(c) (imposing requirements on “entit[ies]”); *id.* § 300a-7(d) (granting certain  
 4 protections to an “individual”). It is clear from this language that the term “entity,” as used in  
 5 Church, was intended to exclude individual persons. *See S.E.C. v. McCarthy*, 322 F.3d 650, 656  
 6 (9th Cir. 2003) (“It is a well-established canon of statutory interpretation that the use of different  
 7 words or terms within a statute demonstrates that Congress intended to convey a different  
 8 meaning for those words.”). Therefore, the term “entity” as used in Church cannot encompass the  
 9 term “health care entity” as used in either Coats-Snowe or Weldon, because the phrase as defined  
 10 in those provisions includes specified categories of individuals.

### 11 **III. THE SUBSTANTIVE EXPANSION OF THE CHALLENGED DEFINITIONS REQUIRES** 12 **VACATUR**

13 The Rule’s expansion of the definition of “entity” is but one of numerous ways that the  
 14 Rule exceeds the scope of HHS’s authority, making vacatur the appropriate remedy. *New York* ,  
 15 2019 WL 5781789, at \*24, \*29, \*66 (vacating the Rule because, *inter alia*, HHS lacked authority  
 16 to substantively alter statutory definitions). Indeed, this Court need look no further than the  
 17 definitions of the terms “assist in the performance,” “refer,” “healthcare entity,” and  
 18 “discrimination” to vacate the Rule, as those definitions go to the heart of the Rule and create a  
 19 new system for refusals and accommodation. Congress did not grant HHS the authority to  
 20 construe Church to cover such a broad range of funding recipients—imposing substantive  
 21 obligations and creating refusal rights and enforcement powers never contemplated in the statute.  
 22 *New York*, 2019 WL 5781789, at \*29, \*33, \*66-67 (“With respect to the Church, Coats-Snowe,  
 23 and Weldon Amendments, HHS was never delegated and did not have substantive rule-making  
 24 authority”); Pls.’ Mot. 27-30; Pls.’ Reply 3-7. Based on these and several other independent  
 25 violations of the APA demonstrated by Plaintiffs, as well as the Rule’s constitutional infirmities,  
 26 vacatur of the Rule is warranted. *New York*, 2019 WL 5781789, at \*67-72 (citations omitted);  
 27 Pls.’ Mot. 30-35, 54-55; Pls.’ Reply 3-7, 20.

Respectfully Submitted,

Dated: November 12, 2019

XAVIER BECERRA  
Attorney General of California  
KATHLEEN BOERGERS  
Supervising Deputy Attorney General

*/s/ Neli N. Palma*

NELI N. PALMA  
KARLI EISENBERG  
STEPHANIE T. YU  
Deputy Attorneys General  
*Attorneys for Plaintiff State of California, by  
and through Attorney General Xavier Becerra*

Dated: November 12, 2019

By: */s/ Lee H. Rubin*

LEE H. RUBIN  
*lrubin@mayerbrown.com*  
Mayer Brown LLP  
Two Palo Alto Square, Suite 300  
3000 El Camino Real  
Palo Alto, California 94306-2112  
Tel: (650) 331-2000

MIRIAM R. NEMETZ\*  
*mnemetz@mayerbrown.com*  
NICOLE SAHARSKY\*  
*nsaharsky@mayerbrown.com*  
ANDREW TAUBER\*  
Mayer Brown LLP  
1999 K Street, Northwest  
Washington, DC 2006-1101  
Tel: (202) 263-3000  
*Counsel for Plaintiffs County of Santa Clara,  
Trust Women Seattle, Los Angeles LGBT  
Center, Whitman-Walker Clinic, Inc. d/b/a  
Whitman-Walker Health, Bradbury Sullivan  
LGBT Community Center, Center on Halsted,  
Hartford Gyn Center, Mazzoni Center,  
Medical Students For Choice, AGLP: The  
Association of LGBT+Psychiatrists,  
American Association of Physicians For  
Human Rights d/b/a GLMA: Health  
Professionals Advancing LGBT Equality,  
Colleen McNicholas, Robert Bolan, Ward  
Carpenter, Sarah Henn, and Randy Pumphrey*

Dated: November 12, 2019

DENNIS J. HERRERA  
City Attorney  
JESSE C. SMITH  
RONALD P. FLYNN  
YVONNE R. MERÉ  
SARA J. EISENBERG  
JAIME M. HULING DELAYE  
Deputy City Attorneys

By: */s/ Sara J. Eisenberg*

SARA J. EISENBERG  
Deputy City Attorney  
*Attorneys for Plaintiff City and  
County of San Francisco*

Dated: November 12, 2019

By: */s/ Mary E. Hanna-Weir*

JAMES R. WILLIAMS  
County Counsel  
GRETA S. HANSEN  
Chief Assistant County Counsel  
LAURA S. TRICE  
Lead Deputy County Counsel  
MARY E. HANNA-WEIR  
SUSAN P. GREENBERG  
H. LUKE EDWARDS  
Deputy County Counsels  
*mary.hanna-weir@cco.sccgov.org*  
Office of the County Counsel,  
County of Santa Clara  
70 West Hedding Street, East Wing, 9th Floor  
San José, California 95110-1770  
Tel: (408) 299-5900  
*Counsel for Plaintiff County of Santa Clara*



Dated: November 12, 2019

By: /s/ Richard B. Katskee

RICHARD B. KATSKEE\*

*katskee@au.org*

KENNETH D. UPTON, JR.\*

*upton@au.org*

Americans United for Separation  
of Church and State

1310 L Street NW, Suite 200

Washington, DC 20005

Tel: (202) 466-3234

*Counsel for Plaintiffs Trust Women Seattle,  
Los Angeles LGBT Center, Whitman-Walker  
Clinic, Inc. d/b/a Whitman-Walker Health,  
Bradbury Sullivan LGBT Community Center,  
Center on Halsted, Hartford Gyn Center,  
Mazzoni Center, Medical Students For  
Choice, AGLP: The Association of  
LGBT+Psychiatrists, American Association  
of Physicians For Human Rights d/b/a  
GLMA: Health Professionals Advancing  
LGBT Equality, Colleen McNicholas, Robert  
Bolan, Ward Carpenter, Sarah Henn, and  
Randy Pumphrey*

Dated: November 12, 2019

By: /s/ Genevieve Scott

GENEVIEVE SCOTT\*

*gscott@reprorights.org*

RABIA MUQADDAM\*

*rmuqaddam@reprorights.org*

Center for Reproductive Rights

199 Water Street, 22nd Floor

New York, NY 10038

Tel: (917) 637-3605

*Counsel for Plaintiffs Trust Women Seattle,  
Los Angeles LGBT Center, Whitman-Walker  
Clinic, Inc. d/b/a Whitman-Walker Health,  
Bradbury Sullivan LGBT Community Center,  
Center on Halsted, Hartford Gyn Center,  
Mazzoni Center, Medical Students For  
Choice, AGLP: The Association of  
LGBT+Psychiatrists, American Association  
of Physicians For Human Rights d/b/a  
GLMA: Health Professionals Advancing  
LGBT Equality, Colleen McNicholas, Robert  
Bolan, Ward Carpenter, Sarah Henn, and  
Randy Pumphrey*

Dated: November 12, 2019

By: /s/ Jamie A. Gliksberg

JAMIE A. GLIKSBERG\*

*jgliksberg@lambdalegal.org*

CAMILLA B. TAYLOR\*

*ctaylor@lambdalegal.org*

Lambda Legal Defense and  
Education Fund, Inc.

105 West Adams, 26th Floor

Chicago, IL 60603-6208

Tel: (312) 663-4413

OMAR GONZALEZ-PAGAN\*

*ogonzalez-pagan@lambdalegal.org*

Lambda Legal Defense and  
Education Fund, Inc.

120 Wall Street, 19th Floor

New York, NY 10005-3919

Tel: (212) 809-8585

PUNEET CHEEMA\*

*pcheema@lambdalegal.org*

Lambda Legal Defense and  
Education Fund, Inc.

1776 K Street NW, 8th Floor

Washington, DC 20006

Tel: (202) 804-6245, ext. 596

*Counsel for Plaintiffs Trust Women Seattle,  
Los Angeles LGBT Center, Whitman-Walker  
Clinic, Inc. d/b/a Whitman-Walker Health,  
Bradbury Sullivan LGBT Community Center,  
Center on Halsted, Hartford Gyn Center,  
Mazzoni Center, Medical Students For  
Choice, AGLP: The Association of  
LGBT+Psychiatrists, American Association  
of Physicians For Human Rights d/b/a  
GLMA: Health Professionals Advancing  
LGBT Equality, Colleen McNicholas, Robert  
Bolan, Ward Carpenter, Sarah Henn, and  
Randy Pumphrey*

\* Admitted pro hac vice

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing was electronically filed with the Clerk of the Court for the United States District Court for the Northern District of California by using the ECF system on November 12, 2019. All participants in the case who are registered ECF users will be served by the ECF system.

By: /s/ Lee H. Rubin